A LEGAL INFORMATION GUIDE *for* SENIORS

Wills and Estates
Power of Attorney
Health Care Directives

Promoting Older Manitobans

Manitoba

This publication has been prepared jointly by:
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INTRODUCTION

Nearly everyone has an estate - the things we own and accumulate over our lifetimes, such as real estate, savings, investments and items of personal or sentimental value. Deciding what is going to happen to the contents of your estate is one of the most important decisions you will ever make. A whole body of law exists to govern and make this process easier. This booklet has been developed by the Manitoba Seniors and Healthy Aging Secretariat, The Public Trustee and the Community Legal Education Association (CLEA) to help Manitoba seniors better understand wills and estates, and related matters of powers of attorney and health care directives. The contents reflect questions seniors raise on the Seniors Information Line and with seniors' organizations.

Before publication, the Secretariat consulted with the Manitoba Council on Aging, Age & Opportunity, Manitoba Society of Seniors and a number of seniors groups. Comments and suggestions were sought from a cross-section of service and seniors' organizations. The responses are reflected in the contents, and we thank everyone who has assisted in this vital part of the development of the booklet.

In the following pages, there are certain points to note. All areas of the law use special terms and phrases. Whenever possible, we have tried to define these terms in the text itself. As well, a glossary of terms is located on page 58.

This booklet is intended to provide general information only. How the law affects you depends on your individual circumstances. Also, the law may change from time to time. If you have a legal problem or need specific advice, it is best to consult a lawyer.

The *Common-Law Partners' Property and Related Amendments Act* became law on June 30, 2004. This Act gives property rights to common-law partners, both same sex and opposite sex. Common-law partners are those couples who either have registered their relationship under *The Vital Statistics Act* or have lived together for three years or longer. Under *The Intestate Succession Act, The Wills Act* and *The Dependants Relief Act*, this also includes those couples who have lived together for a year or more and have a child together. This booklet has incorporated the changes to the law that resulted from the coming into effect of *The Common-Law Partners' Property and Related Amendments Act.*

WILLS AND ESTATES

WHAT IS A WILL?

A will is a written document that controls the disposal of a person's property after death.

Manitoba law provides for two forms of wills: the *formal* will and the *holograph* will.

Most wills are formal wills. For a description and more information on the laws on formal and holograph wills, see page 16.

A will must meet the following requirements in order to be valid.

1. The person making the will (the *maker*) must usually be at least 18 years old. The exceptions to this rule are discussed on page 16.
2. The maker must be of sound mind.
3. The will must be in writing. Tape recordings and videotapes do not meet the requirements of *The Wills Act.*

Generally, a witness to a will (and the spouse or common-law partner of that witness) cannot receive any benefit from the will. Similarly, a person who signs a will on behalf of someone who is unable to write (and the spouse or common-law partner of the person who signs) cannot be a *beneficiary* under the will.

IS MAKING A WILL NECESSARY?

Having a will is important. It both disposes of your property under law as you would wish and covers unforeseen circumstances in your life. Even if you think you own nothing of value, a will enables you to take care of items of sentimental value, property that might be inherited before death, or money acquired at death through life insurance, pension benefits or court awards.

People often believe the property they do own will automatically pass to the right person whether or not they have a will. If you don't have a will, this may not always be true; if you have a valid will, your wishes will be followed.

REASONS TO HAVE A WILL

There are many good reasons to have a will, including:

Personal Wishes

Having a will is an effective way to ensure your personal wishes are followed with a minimum of expense and delay. It is also an act of kindness and consideration to surviving family members, who will already be suffering emotionally.

Cost

If you die without a will, the court will have to appoint an administrator to settle the estate. In some cases, this person

will have to purchase a bond, to ensure satisfactory administration of the estate. Where it is necessary to purchase the bond from a bonding company, it may cost more than it would have to draw up a will.

In contrast, an executor (executrix if female) named in a will does not have to post a bond unless he or she does not live in Canada.

Estate Management

An administrator appointed by the court has less power to deal with the estate than has an *executor/executrix*, and no power at all until officially appointed. This can affect that person's ability to manage the property in a way that will most benefit the people who are to inherit it.

Estate Planning

Your will can be an important tool in estate planning. Estate planning involves arranging your property to maximize the benefits of your estate - for example, by deferring capital gains and tax obligations.

Estate planning also involves ensuring that your estate is transferred in a manner that meets your needs and wishes. For example, you may want to preserve assets for your family's benefit. Or, you may want to ensure the orderly succession of ownership and control of some estate assets.

The details of estate planning and related tax implications are complex. You may get further information from your lawyer, accountant, investment adviser or banker.

Property Distribution

If you die *intestate* (without a will), your estate will be distributed according to the inflexible provisions of the law, with no consideration for your personal wishes. In such a case, the law provides benefits only to close relatives. Friends, distant relatives and worthy causes you have supported in the past will receive nothing.

Distribution of personal effects and heirlooms can cause bitterness and division among family members at an emotional time, especially if they believe something was promised to them years ago. This kind of problem can be avoided if there is a will that clearly states who is to get which special items. Similarly, if you are owed money and want to forgive the debt in the event of death, you can do this through your will.

Trusts

Some important matters involving children and grandchildren can be dealt with in a will. The portion of the estate going to a *minor* (a person under the age of 18) is held in trust. If the capital portion of the trust is required for the minor's education and maintenance, it can be made available, but only after permission is granted by the court. In contrast, power to use trust property can be given to a trustee in a will, and can be used without special court permission. Trusts may also be useful to achieve tax savings.

Guardianship of Children

A will is also one way to clearly state your wishes concerning guardianship of children. Although a court must make the final decision on guardianship, instructions in a will can be taken into account as a persuasive statement of the parent's preference.

Other Reasons

Due to certain legal intricacies, people who fall into the following special categories have a greater need for a will than others:

- common-law partners;
- people who wish to leave nothing to certain family members;
- people who own land outside the province;
- people whose residence is unsettled;
- people who have recently married or are thinking of doing so;
- people who are thinking of living as common-law partners;
- people who are separated or divorced;
- people with a history of mental illness;
- elderly people who may be under pressure to give away their property;
- people who have children with special needs.

CONTENTS OF YOUR WILL

A will can be very simple or very complex, depending on your desires, your needs and your estate. Although everyone needs their own will to suit their own circumstances, most people usually include clauses that deal with the following kinds of things:

Distribution

Your will should have clear instructions about how to dispose of your estate. Gifts of real estate are called *devises* and gifts of personal property are called *legacies*. Personal property is any type of property other than real estate.

Residue

The residue of an estate is the property not specifically distributed in a will. Your will should include a clause stating how the residue is to be distributed. Beneficiaries of the residue are called *residual beneficiaries.*

Debts

Your will should contain a clause about how the debts of the estate are to be handled.

Trusts

Wills are commonly used to create trusts for family members, especially spouses and minors. A trust is an interest in property that is being held by one person for the benefit of another person. Trusts can often be used to gain tax savings.

Common Disaster

A clause that states how a will should be read in the event that a wife, husband, common-law partner, child and/or other loved one were to die at the same time.

Funeral Instructions

It is usually not a good idea to include funeral instructions in a will, since in most cases the family will attend to the burial before the will is read. In addition, directions in a will regarding burial usually are not legally binding. It is better to give a copy of your burial instructions to a trusted friend or relative before death.

MAKING A WILL

Although you can make either a* holograph *or a* formal *will without a lawyer's help, it is usually a good idea to obtain the services of a lawyer or trust company.

As a will is one of the most important documents you will ever sign, you should seek professional advice in preparing it. This is particularly true when dealing with guardianship of children, trusts, or beneficiaries with special needs. One small mistake can cost the estate a great deal of money or even invalidate the entire will. The cost of making a simple will is usually between $100 and $150.

WILLS AND ESTATES

If you have not already chosen a lawyer to write your will, the Law Phone-In and Lawyer Referral Program can give you the name of a lawyer who has experience in this area. The first half-hour interview with the lawyer is free. After the initial interview, you are free to hire the lawyer at a fee to be decided between you and the lawyer. Phone 943-2305 or 1-800-262-8800. For more information about working with a lawyer, see the section Choosing and Working with a Lawyer on page 55.

Before Visiting a Lawyer

Since a lawyer will need certain information to write a will, there are several steps you can take before the first interview, to save time and expense:

- Make a list of everything you own, including all valuables, property you own or which will come to your estate at the time of your death, bank accounts, insurance policies and pensions;
- Make a list of jointly owned items;
- Consider or write down what you want your will to contain, including who is to get what, whom you want to act as your executor/executrix, and any special bequests you may have in mind;
- Obtain and list the names, addresses and occupations of the people named in the will;
- Consider discussing your plans with your family and anyone you wish to appoint as executor/executrix, guardian or trustee under the will.

Choosing an Executor/Executrix

Your executor/executrix is the person responsible for settling your estate after your death.

It can be a difficult job, and should be left in the hands of someone capable of performing the required tasks. Often it is best to name a trusted friend or relative. An executor/executrix must be 18 years of age or older. Non-residents of Canada may be appointed, but they may be required to furnish security.

The executor/executrix is entitled to fair and reasonable compensation for the work done in settling the estate. When deciding whom to name as executor/executrix, you should consider the following:

- the size, complexity and value of your estate;
- the time frame involved in the administration of the estate. Certain estates, especially those that set up trusts for infant children, may require a commitment of several years;
- whether you wish to have your personal or business affairs handled by someone close to you or by an unrelated person, financial institution or trust company;
- whether the person you're considering for appointment is able and willing to accept the position.

You can appoint more than one person to act as executor/executrix. You should also name a second choice, in case the first choice dies before you or is unable to act.

Safekeeping a Will

After your will has been written and signed, a copy should be made, labelled as a copy and left in an accessible place, such as your desk or filing cabinet. Store the original copy of the will in a safe place, such as a bank safety deposit box, your lawyer's office or your trust company. You may also want to give your executor/executrix a copy.

FORMAL REQUIREMENTS OF A WILL

As noted earlier, certain requirements must be met to create a valid will. They can be put into three basic categories:

1. Testamentary Capacity

The first requirement for a valid will is that you must be of sound mind at the time your will was made. Judges and lawyers use the term testamentary capacity. In general terms, this means whether you have enough mental ability to make a valid will. Often, however, courts appreciate the vulnerability that sometimes comes with advancing age.

If a will is challenged, on the basis that you were not of sound mind when you wrote the will, the court will consider four basic factors to decide the issue:

(a) Nature of the act

The court will ask whether you knew you were making a will and that this document would determine how your property would be distributed after death.

(b) The property disposed

The court will want to determine if you generally understood and appreciated how much (and what kind) of your property was to be distributed.

(c) Normal expectations

The court will want to know whether you understood what one normally does in a will. For example, a person may certainly leave a child out of his or her will (with certain exceptions for dependants), but if he or she simply forgot the child existed, the court may conclude that there was not sufficient mental capacity.

(d) Rational consideration

The court will want to ask whether you gave rational thought and consideration to the above items before deciding how to dispose of your property.

Proving Capacity

The person asking the court to approve your will must prove you were of sound mind when it was made. However, if on the surface the will appears in order, the court will presume that capacity existed. In that case, anyone opposing the will

must prove the contrary. Although determining whether the maker of the will had sufficient mental capacity is a legal and not a medical test, medical evidence from a doctor or other health-care expert will be considered. Other evidence the court will consider includes the testimony of the witnesses to the will and the lawyer who prepared the will, and the opinions of friends and relatives.

If there is any doubt as to capacity, the lawyer drafting the will should ask questions to determine whether the maker has the four elements of capacity. If the will is later challenged, the lawyer can then testify about the maker's responses.

2. Age

In Manitoba, a person under the age of 18 cannot make a valid will. There are exceptions, however. If a young person is (or has been) married, is in the armed forces or a sailor at sea, he or she may make a valid will. If a maker under the age of 18 does not come within one of these exceptions, the court would likely find the will to be invalid, regardless of his or her age at death.

3. Legal Formalities

In Manitoba, *The Wills Act* prescribes the formalities that must be complied with for a will to be valid. The Act recognizes two types of wills: the formal will and the holograph will. A holograph will is an informal type of will and is discussed separately.

For formal wills, the Act outlines four basic requirements:

i) The will must be in writing.

ii) It must be signed at the end by the maker, or by someone else at the maker's direction and in his or her presence.

iii) The maker must sign (or acknowledge his or her signature) in front of at least two witnesses who are present at the same time.

iv) At least two witnesses must sign in the presence of the maker.

Though not required by *The Wills Act*, it is now common practice for the maker and witnesses to initial every page of the will at the bottom right corner.

Holograph Wills

A holograph will is one that is written and signed entirely in the maker's own handwriting. It is not necessary to have witnesses sign a holograph will. To be valid, a holograph will must also clearly contain a fixed and final expression of intent to dispose of property upon death and not merely state a future intention.

When a holograph will is probated, the Probate Court will usually require affidavits from two people who are not beneficiaries, who knew the maker for a number of years (including the time when the will was written), who are familiar with the maker's handwriting and who can verify the maker's mental capacity at the time the will was written.

You may wish to consult your lawyer before drafting a will on your own. A simple will prepared by a professional need not be expensive and offers certain assurances that the document is valid and accurately reflects your intentions.

Pre-Printed Will Forms

These are wills often sold in drug stores, stationery shops or by mail order. They are usually a fill-in-the-blank form, on which the maker inserts the names of beneficiaries and witnesses.

If properly executed, these forms can constitute a valid will. *Unfortunately, it is very easy to make mistakes;* as a result, these types of wills often are not executed properly. In such cases, the court can look only at the handwritten words, and not the typed or pre-printed ones. If the handwritten words, on their own, accurately express the maker's intentions within the context of the law, the document may be a valid holograph will. However, such a result is rare.

CHANGING OR REVOKING A WILL

You should review your will every few years to make sure it is current. It is wise to review your will whenever you move, change marital or common-law status, acquire or lose a substantial amount of property, want to add or remove a beneficiary, or when new laws are passed.

You may change a will as often as you wish. Changes can be made by an addition to the will, called a codicil, or by making

an entirely new will. In order to be valid, all changes to a will must comply with the usual legal requirements for a valid will as discussed previously.

A will can be revoked or cancelled in the following ways:

Marriage

Generally, when someone marries, all previous wills are automatically revoked. This occurs even if the maker intends the will to remain the same. The one exception is if the will was made in contemplation of a specific marriage. The will not only would have to state that it was made in contemplation of marriage, but must also name the person whom the maker was marrying. If the will is made in contemplation of a common-law relationship and the testator marries that common-law partner, the marriage does not revoke the will.

There may be further changes to *The Wills Act*. If these changes become law, becoming a common-law partner will also revoke a will.

Destruction

If you destroy your will with the intention of revoking it, it is revoked and therefore invalid. Even if the will is not completely destroyed and is still readable, the court will consider it revoked if your intention was to revoke it. However, it is possible for a will to be destroyed and still be valid. If the will was destroyed accidentally or if someone else destroyed it without your consent, the will would still be

valid. If someone else destroyed the will, it could be considered revoked if the destruction was at your request or direction.

Document of Revocation

A will should contain a clause stating that all prior wills are revoked/cancelled. This is usually the first clause of any will, but it need not be part of an entirely new will.

Subsequent Will

A subsequent will usually should contain a revocation clause to invalidate all previous wills. If the new will does not contain this clause, however, previous wills are not necessarily invalid. A will executed before the new will would be invalid only to the extent that it is inconsistent with the new one.

Alterations to an existing will

An alteration to an existing will is invalid unless the change was properly executed. Like a will, a properly executed alteration normally needs to be signed by the maker and two witnesses, as discussed previously. The court will presume that any alteration occurred after the will was first executed. If the alteration is ineffectual, the original clause will remain valid. One exception to this rule is if the clause that was altered is now unreadable. In this case, the original clause and the attempted alteration are revoked and therefore invalid.

ESTATE ADMINISTRATION

Letters of Probate

If you have been named executor/executrix of an estate, you will have to ask the court to have the will *probated*. Probate is a legal word meaning proof. When a person dies leaving a will, the executor/executrix named in the will must *probate* (prove) the will before proceeding to administer the estate of the deceased person. In Manitoba, the application must include the will, a petition for probate, an oath signed by the executor/executrix, affidavits signed by the witnesses to the will and an inventory of the property in the estate. If the court is satisfied that the will is valid, it will grant Letters of Probate authorizing you to settle the estate.

Letters of Administration

Where a person dies without having made a will, anyone who has an interest in the estate may apply to the court for permission to administer the deceased's affairs. The court will determine who is the appropriate person to administer the estate and appoint that person by issuing Letters of Administration. Generally, the closest relative who applies (the surviving spouse or common-law partner having the best right) is appointed administrator by the court.

The administrator must live in Manitoba, and must give a personal guarantee to the court that he or she will administer the deceased's affairs properly. Where the estate is large, the administrator may be required to purchase a bond from a commercial bonding company to ensure the proper administration of the estate.

DUTIES OF AN EXECUTOR/EXECUTRIX; ADMINISTRATOR

The duties of the executor/executrix and administrator are very similar. The term *personal representative* is often used as a generic term for both. In addition to obtaining letters of probate or administration, the personal representative must perform several other duties. Other primary duties of the personal representative are:

Funeral arrangements/expenses

The personal representative has the authority to incur reasonable funeral expenses, including burial and a headstone, on behalf of the estate.

Debts

The personal representative must ensure that outstanding debts and obligations of the deceased are paid. An advertisement should be placed to notify all creditors that the estate will pay all lawful claims against it. The claims of creditors take precedence over beneficiaries. The personal representative must also collect any debts owed to the estate.

The personal representative must also give notice within 30 days of the grant of probate to a spouse or common-law partner under *The Family Property Act* formerly known as *The Marital Property Act*. This notice tells the separated spouse or common-law partner that they have 6 months to make a claim against the estate for an equal division of marital property.

Taxes

The personal representative is responsible for ensuring that the final tax returns of the deceased and the estate are filed and that income tax is paid. For more information about these matters, phone Canada Revenue Agency (CRA) toll-free at 1-800-959-8281 or visit the CRA Web site at www.cra-arc.gc.ca

Distribution of the Estate

Once the debts of the estate have been settled, the remaining assets may be distributed to the beneficiaries. However, the personal representative may allow a beneficiary possession of an asset that he or she is prospectively entitled to, before all debts are satisfied. If not enough funds remain to satisfy the gifts in the will, the gifts will be reduced according to established rules.

Settlement and Allowance of Accounts

The personal representative also has the duty of keeping accounts for all funds collected or distributed by the estate. Before the estate is wound up, residual beneficiaries (see page 9) must approve the accounts. Also, any interested party (e.g. possible beneficiary, creditor) may ask the court to approve the accounts. If any of the residual beneficiaries cannot or do not approve the accounts, the personal representative must ask the court to approve the accounts.

OTHER MATTERS

Legal Fees

There are specific rules for the legal fees that may be charged in the administration of an estate. The fees depend on the value of the estate, and may be changed by the court when the personal representative passes the accounts of the estate.

Usually, the fees may not exceed the following percentages of the total value of the estate:

- three per cent of the first $10,000;
- two per cent of the next $90,000;
- one per cent of the next $200,000.

When the personal representative is a lawyer, a trust company, or the Public Trustee, only 40 per cent of these fees may be charged.

Additional fees may be charged on estates valued at more than $300,000. The fees will depend on the time spent, the results achieved and the amount involved.

A lawyer may also charge additional fees for special services, such as appearances in court, maintaining and passing accounts, acting on the sale of estate assets and providing services regarding assets that do not form part of the estate.

WILLS AND ESTATES

Estates of Small Value

A will must be probated, unless the value of the estate is less than $10,000. In such a case the executor may avoid the cost of probate by applying to court for an *administration order.*

Survivor Benefits

Survivor benefits under the Canada Pension Plan may be available to the estate and to survivors of the deceased. There are three kinds of survivor benefits: surviving spouse's pension, orphans' benefits and death benefits.

The spouse's pension is paid on a monthly basis. The amount of the pension depends on the amount the deceased had contributed to the plan.

Orphans' benefits are monthly benefits provided for the dependent children of the deceased. To qualify, the children must be under the age of 18 or be between 18 and 25 and attending school or university full-time.

The death benefit is a lump sum benefit payable to the estate of the deceased. The amount of this benefit depends on the amount the deceased had contributed to the plan.

Application for these benefits should be made within a year of death or else there may be a loss of benefits. For more information, contact Canada Pension Plan at toll-free 1-800-277-9914, or reach them at their Internet site at http://www.sdc.gc.ca/en/gateways/topics/cpr-gxr.shtml

WHEN THERE IS NO WILL

The Intestate Succession Act

***If you die without a valid will, you are considered to have died* intestate.**

In this case, your property will be disposed of under *The Intestate Succession Act*, which contains a set formula for distributing a deceased's property. You may also die partially intestate if you have a valid will that fails to completely dispose of all property. In this case, only the remaining property outside your will's provisions will be dealt with under the Act.

If you die intestate, the court must appoint an administrator of your estate. An administrator's duties are similar to those of an executor, except that most discretion is eliminated by the Act's inflexible distribution scheme. The administrator must take inventory of all your property and must then satisfy all outstanding debts, estate fees, funeral expenses, income tax and any other obligations. The rest of the estate is then distributed according to the following basic provisions:

1. If a surviving spouse or common-law partner and no issue, the spouse or common-law partner receives everything. (*Issue* are lineal descendants of an individual. These would include children, grandchildren, great-grandchildren, etc.)

2. If a surviving spouse or common-law partner and issue, and all of the issue of the deceased (the intestate) are also issue of the surviving spouse or common-law partner, the surviving spouse or common-law partner receives everything.

3. If a surviving spouse or common-law partner and one or more of the issue of the intestate are not the issue of the surviving spouse or common-law partner, the surviving spouse or common-law partner will receive the greater of the first $50,000 or half of the estate and half of the remaining estate.

4. In the case of a partial intestacy, the surviving spouse or common-law partner's entitlement to the first $50,000 or one half of the estate would be reduced by an amount equal to the value of any benefit received by the surviving spouse or common-law partner under the will.

5. If the intestate and spouse or common-law partner were living separate and apart at the time of the deceased's death and either or both of the following conditions is satisfied, the surviving spouse or common-law partner shall be treated as if she or he predeceased the intestate:

   a. During the period of separation, one or both of the spouses or common-law partners made an application for divorce or for dissolution under The Vital Statistics Act, or an accounting or equalization of assets under *The Family Property Act* and the application was pending or had been dealt with by final order at the time of the intestate's death;

b. Prior to the intestate's death, the intestate and his or her spouse or common-law partner divided their property in a manner that was intended by them, to separate and finalize their affairs in recognition of their marriage breakdown or the break-down of their common-law relationship. When the parties have been separated for a long period of time it is often difficult to ascertain whether this condition has been satisfied. If there is a surviving married spouse and one or more common-law partners, the spouse or common-law partner whose relationship with the intestate was the most recent at the time of the intestate's death has priority over the spouse or common-law partner from an earlier relationship.

6. The balance of the intestate's estate not going to the surviving spouse or common-law partner, or the entire estate if there is no surviving spouse or common-law partner, shall be distributed among the issue of the intestate on a per capita basis as set out in section 5 of the Act.

7. If there is no surviving spouse or common-law partner or issue, the estate goes to the intestate's parents or the survivor of them.

8. If both of the parents have predeceased, the estate is distributed among the issue of either or both of the parents of the intestate on a per capita basis as set out in section 5 of the Act. This would include all issue resulting from any relationship of either parent of the intestate.

9. If both of the parents have predeceased leaving no surviving issue, and the intestate is survived by one or more grandparent or issue of grandparents:

   (a) 1/2 of the intestate's estate goes to the paternal grandparents or to the survivor of them. If both of the paternal grandparents have predeceased, the estate is distributed among the issue of either or of both of the paternal grandparents of the intestate on a per capita basis as set out in section 5 of the Act, and

   (b) 1/2 of the intestate's estate goes to the maternal grandparents or to their issue in a like manner.

10. If there is only a surviving grandparent or issue of a grandparent on the paternal or maternal side, the entire estate goes to the kindred on that side.

11. If there are no surviving grandparents or issue of grandparents, the intestate's estate is divided into 4 shares and 1/4 goes to each set of great-grandparents or their issue. Section 4(6) of the Act provides a detailed description of how this distribution should be made.

12. Section 5 of the Act describes how a distribution is to be made to the issue of a person.

    (a) Section 5(1) states that the estate or the part of the estate, which is to be distributed, shall be divided into as many shares as there are:

        (i) Surviving successors in the nearest degree of kinship to the intestate which contains any surviving successors; and

(ii) Deceased persons in the same degree who left issue surviving the estate.

This section of the Act has been misinterpreted by many people. It is therefore very important to get legal advice prior to distributing an estate to the issue of a person.

13. If there are no successors under the Act, the estate goes to the Crown.

LIMITS ON TESTAMENTARY FREEDOM

The general freedom to dispose of your property upon death is not absolute. *The Dependants Relief Act*, *The Homesteads Act* and *The Family Property Act* (formerly known as *The Marital Property Act*) all work to provide adequate support for a surviving spouse or common-law partner and/or dependants. Each of these Acts can be used to challenge the provisions of the will.

The Dependants Relief Act

Under this Act, a person dependent on the deceased may apply to the court for support if the provisions of the will are not adequate. A current spouse, an ex-spouse who was receiving maintenance payments, a dependent child or grandchild may all be entitled to relief. There are no distinctions between adopted and naturally born children. A common-law partner of the deceased may also be eligible for support if they lived together for at least three years with no children or lived together for at least one year and had a

child, or if the surviving common-law partner was entitled to support payments.

The court will consider all relevant factors to determine if relief should be granted for a dependant. These factors include:

- the conduct and character of the dependant;
- whether the dependant is entitled to any other provision for maintenance;
- the financial circumstances of the dependant;
- evidence of the maker's reasons for not providing for the dependant.

Once a court has decided that relief is warranted, it has broad discretion to determine the nature and extent of reasonable support. Such support is granted from the estate of the deceased.

The Homesteads Act

This Act creates two basic rights for a spouse or common-law partner who does not own the family home.

First, the spouse or common-law partner who owns the home may not sell it during the lifetime of the other spouse or common-law partner without consent. Second, if the spouse or common-law partner who owns the home dies, the surviving spouse or common-law partner is granted a *life estate* in the home. This means the surviving spouse or common-law partner has the right to live in the home until he or she dies, even if the home was left to someone else.

The Act also provides various forms of relief if either of these rights are violated.

The Homesteads Act defines common-law partners as those couples who either have registered their common-law relationship under *The Vital Statistics Act* or have lived together for three years or more. Only one spouse or common-law partner has homestead rights. A subsequent spouse or common-law partner would only have homestead rights if the homestead rights of the first spouse or common-law partner have been released or terminated.

The Family Property Act (formerly The Marital Property Act)

The Family Property Act supports the notion that the accumulation of assets during a marriage or common-law relationship is a joint effort and when the relationship ends, those assets should be divided equally. As such, the Act provides that upon the death of one spouse or common-law, the surviving spouse or common-law partner may apply for an equal division of marital property.

The surviving spouse or common-law partner usually has six months to apply to court for an equal division of assets. These provisions do not prevent the spouse or common-law partner from also accepting gifts under the deceased's will. Similarly, any rights under this Act are in addition to those under *The Homesteads Act*. However, if the deceased died without a will, the value of any property received under The Intestate Succession Act is deducted from the equalization payment under *The Family Property Act*.

Under *The Family Property Act*, common-law partners are those couples who either have registered their common-law relationship under The Vital Statistics Act or have lived together for three years or more.

OTHER CHALLENGES TO A WILL

***Besides other limits on testamentary freedom, a will can be challenged on any of the matters discussed with respect to the formal requirements of a will. A will can also be challenged on grounds of* fraud, undue influence or suspicious circumstances.**

Fraud and Undue Influence

Fraud occurs when a person deceives the writer of a will into making a gift he or she might not otherwise make. To tell an aging person that you were his long-lost son or that all his other children were dead, when that was not true, may result in that person's will being invalidated by the court. Undue influence is different from fraud in that it does not involve deception but rather pressuring the writer of a will into making a gift. The courts have held that an attempt to persuade a person into making a gift is allowable as long as it is not coercion. Fraud and undue influence are not often proved, as the party making the allegation must prove that it occurred.

Suspicious Circumstances

A suspicious circumstance is anything that excites the suspicion of the court, such as an unusually disproportionate gift to a particular person. The test for suspicious circumstances is embedded in mental capacity and not fraud. As such, the burden of dispelling any suspicious circumstances falls on those wanting to prove the will valid. The proof necessary will be proportionate to the gravity of the suspicion.

FREQUENTLY ASKED QUESTIONS

Does the administrator of a will have to post a personal bond?

Yes, in most cases an administrator must give a personal bond to the court. A person who is applying to be the administrator will usually have to give a personal bond for twice the amount of the estate. In addition, a *surety* may be required. Simply put, a *surety* is a person who binds him/herself to satisfy the obligation of another person, if the latter fails to fulfill the obligation. When the total value of the estate is less than $50,000, a surety is not required. Where the total value is more than $50,000 but less than $100,000, only one surety is required. Where the estate is valued at more than $100,000, two sureties are usually required. However, where all of the beneficiaries of the estate are adults and give their consent, the court may dispense with the requirement of having a bond, or reduce the amount of the bond, or dispense with the need to have a surety.

WILLS AND ESTATES

I have recently moved here from another province, where I had a will made. Should I have my will rewritten in Manitoba?

Under *The Wills Act,* moving to Manitoba from another province after a will has been made does not necessarily render the will invalid. In wills made in another province, provisions dealing with movable property are valid in Manitoba if, when they were made, they complied with the law of the province where the maker lived or where the will was made. (Movable property is all property other than land or an interest in land, such as a mortgage. It includes most types of chattels, such as cash, vehicles, stocks, bonds and other personal possessions.) Furthermore, provisions dealing with land are valid in Manitoba if they are also valid under the law of the province where the land is located.

Can I overrule the executor's decision regarding the burial of my spouse?

Generally, the executor, not the surviving spouse, has the right to decide the place and manner of burial. As well, directions contained in a will respecting burial usually are not legally binding. Similarly, it has been decided that directions in a will respecting funeral arrangements that are objectionable to the deceased's family do not have to be followed. Incidentally, since wills are often left unread until after the funeral, it is usually better to put directions about burial in a memorandum to be read upon death instead of in the will.

WILLS AND ESTATES

If a person gets a divorce, is a will made before the divorce valid?

Yes, but this normally changes if the will contains a gift to the ex-spouse or the ex-spouse is appointed an executor/executrix or a trustee. In such cases, unless otherwise stated in the will, the bequest or appointment is usually revoked and will be interpreted as if the ex-spouse died before the maker.

In contrast, marriage usually revokes a will unless the will declares that it is made in contemplation of marriage to a specific person. Other ways for a maker to revoke a will include making another will or destroying the will with the intention of revoking it.

What if a person is living in a common-law relationship and the common-law partners separate. Is a will made before the separation valid?

The will is still valid but a gift to a common-law partner and an appointment of that common-law partner as executor or trustee will be automatically revoked if the common-law partners separate for three years or if their common-law relationship is dissolved under *The Vital Statistics Act.*

If land is jointly held, should it be included in the inventory of the estate of a deceased person?

Generally, only property that was owned solely by the deceased should be included in the estate. *Joint tenancy* refers to ownership of land by two or more people on the

basis that when one of them dies, the interest of the deceased passes to the person (or persons) whose name is on the title. Jointly held land should not be included in the estate. Similarly, proceeds of insurance policies owned by the deceased should not be included if the proceeds are to be paid to a named beneficiary. In addition, the estate should not include a pension or retirement plan that provides benefits payable on death to a designated beneficiary.

How old must one be in order to be an executor of their parent's will?

In Manitoba a person must be at least 18 years of age to be an executor. Where a minor is the sole executor named in a will, responsibility for administering the estate is usually given to the guardian of the minor. The guardian retains responsibility for the estate until the minor reaches the age of 18, at which time it may be given to the minor.

If a bequest in a will is made to a person who predeceases the donor, does the bequest still have to be given out?

A bequest is a gift of personal property made in a will, while a devise is a gift of real estate made in a will. Generally, if a bequest or a devise is made to a person who has predeceased the maker, it fails and falls to the residue of the estate. However, this is not true if that person was a child, grandchild, great-grandchild, brother or sister of the deceased and left issue surviving the testator (the person who made the will). In this case, the gift would be distributed

as if the person to whom the gift was left died intestate without a surviving spouse or debts.

For example, let's say you leave an item in your will to your married son, but he dies before you. In such a case, the gift is distributed as if he had died without leaving a spouse or debts. The effect of this would be that the issue of your son, not your daughter-in-law, will inherit the gift that would have gone to your son had he lived.

All of this may be overridden by statements to the contrary made by the maker in the will. The clause might state that in such a case, the gift should go to the residue of the estate. The residue of an estate includes all property not specifically distributed in the will. Wills generally contain a clause stating how the residue should be distributed.

Is my will valid if I do not have witnesses to the signature?

A holograph will does not require witnesses to the signature of the person making the will. A holograph will is valid in Manitoba if it is written entirely in the handwriting of the person making it and is signed and dated. A formal will (one that is not entirely in your handwriting) must be signed by two witnesses. Generally, witnesses and spouses or common-law partners of the witnesses cannot benefit from the will. In addition, other requirements apply to all wills: they must be in writing; the person making the will must be of sound mind; and usually must be at least 18 years of age.

WILLS AND ESTATES

If I have a valid will, can The Intestate Succession Act still apply?

Yes. If your will does not fully dispose of your property, *The Intestate Succession Act* may apply to any property that remains. This is one reason why it is wise to update your will regularly, and especially after changing residences or acquiring or disposing of property. A properly drafted residue clause can also work to avoid intestate provisions.

My daughter witnessed my will. Can she also be a beneficiary?

No. If a will makes a gift to a witness or the spouse or common-law partner of that witness, the gift becomes invalid. It is possible to validate a gift, however. By drafting a codicil that confirms the contents of the existing will and is signed by two different witnesses, the gift would then become valid. Also, in certain circumstances, the court can validate a gift to a witness.

Can the executor of a will also receive a gift in the will?

There is no rule that prevents an executor from being a beneficiary under a will.

WILLS AND ESTATES

What happens when you cannot find the will of the deceased person?

This situation raises two distinct problems. First, if the will was destroyed, it is presumed that the maker revoked it. The presumption will be strong if the maker was a careful person who would not misplace or accidentally destroy the will, and was known to have custody of the will. So it must be shown that the will was either misplaced or accidentally destroyed. Second, if a valid will is found to have existed, it is very difficult to prove what was in it. The court may hear from someone who saw or heard the maker discuss the will. The court may also review the lawyer's draft or his or her notes if applicable. If the court does not feel it knows most of the will's contents, it may ignore it completely.

What happens if the maker sells something given in the will?

If a person writes a will and then sells or gives away the proposed gift, there is no gift and the beneficiary gets nothing.

POWER OF ATTORNEY

Planning Your Future

Everyone should anticipate the possibility that at some time in the future they may not be able to manage their own affairs.

People can make arrangements in advance so that personal and financial affairs are handled properly if they become physically or mentally incapacitated.

This type of planning has two major advantages. First, although you will give up control over your affairs when you are no longer capable of handling them, you will have the satisfaction of knowing you have ensured that they will be managed properly. Second, whoever has been entrusted with this responsibility will benefit from knowing your wishes. There are a number of ways in which a person's affairs can be managed once he or she is no longer capable. A common method of doing this is by an enduring power of attorney.

The Function of a Power of Attorney

A power of attorney is the legal authority contained in a written document that allows someone else to manage your legal and financial affairs. Although this power can be very broad, it **does not allow** a person to make health care decisions. A power of attorney may be useful if you are unable to adequately manage your affairs due to limited mobility or an extended absence.

The **person who transfers the power** is called the **donor,** and the **person receiving the power** is called the **attorney.**

POWER OF ATTORNEY

An attorney need not be a lawyer. The person you choose may be a trusted friend or relative, a spouse or common-law partner or a trust company. Whoever you choose, the person will be legally obligated to act on your behalf if he or she accepts the appointment.

It is also important to note that when you give someone power of attorney, you retain the right to manage your own affairs. You are still free to deal with any property, bank accounts or investments that are included in the power of attorney.

Requirements

Almost anyone can be chosen as an attorney, as long as he or she is age 18 or more and mentally capable. A person named as an attorney does not have to accept the responsibility and may refuse to act in that capacity.

The only requirements for being a donor are that you be an adult and mentally competent to understand the consequences of your decision. You must understand exactly what type of power, and over what property, you are transferring to the attorney.

The document itself must be in writing and signed by you. While the document must bear your signature, it need not be signed by the person chosen as attorney. The document is usually signed by a witness. The witness should not be the spouse or common-law partner of the attorney. There are specific rules for witnessing an Enduring Power of Attorney. These will be discussed later (page 43).

POWER OF ATTORNEY

Duties of the Attorney

Generally, an attorney must always act in accordance with the instructions in the document granting power of attorney. Further, the power granted must always be used for your benefit, and no other purpose. The attorney also must keep accurate records of all transactions concerning your affairs.

Types of Powers

You may make a power of attorney as detailed or broad as you wish. The scope of the authority granted to an attorney depends on the type of power you give. There are two types of power of attorney: general and specific power. A power may also be temporary or enduring.

Specific Power

This is used to grant a power of attorney for a specific task, such as selling an asset. The power granted to the attorney is limited to the specific task, as detailed in the power of attorney document. The power ends when the task is completed or if the donor becomes mentally incapable.

General Power

A general power allows the attorney to make decisions concerning all of the donor's business and financial affairs. The attorney has the authority to manage the donor's banking and investments, and sign all documents with respect to the donor's property. This power also ends if the donor becomes mentally incapable.

Enduring Power of Attorney (EPA)

You may also create an enduring power of attorney. This allows the attorney's authority to continue even if you become mentally incapable. An enduring power can be granted only while you are mentally competent and must be witnessed. Some of the rules about EPA's follow.

Execution

An EPA must be witnessed by a person qualified to perform marriages, a judge, justice of the peace or magistrate, licensed physician, notary public, lawyer or police officer.

The witness must sign a document swearing under oath that he or she saw the maker sign, and that the maker was apparently mentally competent at the time. This document, called an *Affidavit of Execution,* is then attached to the EPA.

If the maker is physically unable to sign the power of attorney, or is unable to read, he or she may direct someone else to sign it for them. This also must be witnessed in front of a qualified witness.

Attorney

The maker must be mentally competent when the EPA is signed and may appoint any person over the age of 18 who is mentally competent to be the attorney. An exception to that rule is that the attorney may not be an undischarged bankrupt.

The maker may appoint more than one person. If they are to make decisions together, the maker must say so in the EPA. Otherwise, the attorneys will be considered to act successively, with the second named person having authority to act only if the first named is unable to do so.

Before signing the EPA, the maker should ask the proposed attorney whether he or she is willing to act. Should the maker become incompetent, and the attorney has begun acting, the attorney must act as directed in the EPA. The attorney may only resign with the permission of the Court of Queen's Bench.

Accountability

The EPA may contain the name of a person to whom the attorney must account on a regular basis. If no person is named, the attorney must account to the maker if he or she is competent, or if incompetent, to the maker's nearest relative. This ensures that there will be someone watching over the attorney's actions.

Springing Powers of Attorney

An EPA may be designed to come into effect at some time in the future. For example, the maker may provide that the EPA will only come into force if the maker is declared by a doctor to be mentally incompetent. This is called a "Springing Power of Attorney".

The maker may also name a person (called the declarant) to declare that the event has occurred, which brings the springing power of attorney into effect. The written declaration of the declarant would be attached to the EPA, and presented to banks or financial institutions to prove that the attorney has authority to act.

Public Trustee

Prior to April 7, 1997, an EPA ended if a Committee, including the Public Trustee was appointed. This has now changed. If there is a valid EPA, and the Public Trustee is subsequently appointed as Committee, the authority of the attorney will not automatically end.

The Public Trustee will investigate to determine whether the EPA is valid, and whether the named attorney is acting properly and in the best interests of the maker. If so, the Public Trustee will advise the maker and the attorney that the power of attorney will continue in effect, and the Public Trustee's authority will end automatically. However, if the Public Trustee believes that the EPA is not valid or that the attorney has not been acting properly, the Public Trustee may advise the maker and the attorney accordingly, and the EPA will automatically end.

Termination of Attorneyship

An EPA may be terminated in one of several ways, including by the death of the maker or the attorney, the bankruptcy of the maker or the attorney (unless the power of attorney provides otherwise) or the involvement of the Public Trustee.

POWER OF ATTORNEY

As long as the maker is competent, he or she may revoke the EPA in writing at any time.

An enduring power of attorney should be discussed with your lawyer.

RELATED MATTERS: COMMITTEESHIP, THE PUBLIC TRUSTEE AND TRUSTS

Committeeship

Alzheimer Disease, a stroke or another unfortunate event can cause mental incompetence that results in the loss of legal capacity to administer legal and financial affairs. If this happens, a *committee* may be appointed by the court or, in the case of the Public Trustee, by the Chief Provincial Psychiatrist.

Private Committee

A family member, friend or trust company wishing to assume responsibility for the affairs of a mentally incompetent person must apply to a court. Although the application does not usually require a court appearance, the services of a lawyer are usually necessary to prepare the required documents. The estate of the mentally incompetent person may pay the fees for this procedure.

POWER OF ATTORNEY

A court-appointed committee has the power to handle financial affairs, and *must pass the accounts of* the estate on a regular basis. This means getting court approval of the financial records. The committee must seek court approval for major decisions such as the sale of real estate. The court may also authorize the committee to make decisions about personal care, including health care, where and with whom the person will live, and decisions about daily living.

The Public Trustee

Where there is no one willing or able to be the private committee of a mentally incompetent person, the Chief Provincial Psychiatrist may appoint the Public Trustee of Manitoba to act in this capacity. In such a case, the Public Trustee is responsible for making all decisions affecting the incompetent person's personal and financial interests.

Trusts

You can make someone else responsible for managing all or part of your financial affairs by creating a trust for yourself. This involves transferring ownership of your property to your trustee. The person creating the trust dictates the terms and conditions of how the trust is managed. The trustee then holds the property in trust for you, as the beneficiary of the trust. The property of the trust is used for your benefit according to the terms of the trust.

POWER OF ATTORNEY

FREQUENTLY ASKED QUESTIONS

My mother granted an enduring power of attorney to her neighbour, and she is now mentally incompetent. I don't believe the neighbour is acting properly. What can I do?

You should first ask the attorney for a full accounting of everything he or she has done as attorney. If you don't receive it, or aren't satisfied, you can apply to court to force the attorney to account, or be removed as attorney. You could also apply to be committee of your mother in place of the attorney. As a last resort, you could ask to have the Public Trustee appointed as committee of your mother.

How can I prevent the misuse of a power of attorney?

It is a good idea to put a clause in the power of attorney document to provide that the attorney regularly give an accounting of your finances to you and/or someone else you name. If you don't name someone to whom the attorney must account, your closest relative is entitled to ask for and receive an accounting from the attorney. You can revoke power of attorney at any time upon written notice to the attorney.

If I fill out a power of attorney form with one bank, will this cover my account and mortgage at another bank?

No. Every bank has its own forms that you fill out to grant someone a power of attorney. A form from one bank will relate only to your dealings with that bank (and its branches). It will not cover your dealings with another bank.

POWER OF ATTORNEY

Can the person I name as attorney sell my house?

Yes, if you have granted appropriate power to your attorney. You can grant power of attorney for a specific task (e.g., banking, paying bills or selling your house). Or you can grant a general power, where you list what authority the attorney will have. This could include selling your home.

However, there are some exceptions to this rule. For example, if the house is jointly owned, both owners must consent to the sale. Also, if you gave power of attorney to your spouse or common-law partner, the power is not valid for the sale of the marital home.

HEALTH CARE DIRECTIVES

Advances in medical research and treatments have, in many cases, enabled health care professionals to extend lives. Most of these advancements are welcomed, but some people fear that life can be prolonged regardless of the quality of life or the patient's wishes.

In Manitoba, *The Health Care Directives Act* acknowledges and respects that people have the right to accept or refuse medical treatment. A health care directive, also referred to as a *living will*, allows you to make choices about your future medical care.

The Function of a Directive

A health care directive is a written document that allows you to express your specific instructions as to the level and type of medical treatment you want performed if you are ever unable to indicate your wishes because of mental incompetence or inability to communicate. A directive also allows you to appoint another person, called the proxy, to make health care decisions on your behalf if you are unable to do so.

Legal Requirements

To be valid, a health care directive must be in writing, signed and dated. This form acts as a guide for providing the proper information in a health care directive but it is not a requirement. A valid directive may be any written document that is signed and dated. The directive will be binding on

health care professionals and your proxy, provided the instructions are consistent with accepted medical practices.

The person making the directive must be at least 16 years of age and be able to understand the consequences of his or her decision. Once completed, a health care directive records only your current wishes and can be changed at any time.

The Manitoba Government has prepared a health care directive form for your convenience. To obtain a copy, call the Seniors Information Line at 945-6565 (toll-free 1-800-665-6565).

Before Completing a Directive

The decisions a person makes in a health care directive are very important and should never be entered into lightly. When you make a directive, it is important to discuss your intentions with your doctor and other health care professionals so that you are aware of the medical terms used for different types and levels of medical care. This will help ensure that your wishes are clearly understood.

It may also be useful to talk to your lawyer to understand any legal issues/terms involved. For example, if you spend time outside Manitoba, you may wish to ask your lawyer about the validity of your living will in another jurisdiction.

You should discuss your intentions with close family members and your potential proxy, so they are fully aware of your wishes. This ensures that they will know a health care directive exists and can refer to it if necessary. It can also be useful to read booklets, pamphlets and articles on the subject to become even more informed.

HEALTH CARE DIRECTIVES

Choosing a Proxy

As it is impossible to anticipate every circumstance, it can be important to choose a proxy. The proxy will make medical decisions on your behalf if you are unable to do so. The proxy's decisions will be based on the specific instructions in your health care directive and his or her personal knowledge of your wishes.

Choosing a proxy is a very personal decision and should be made with care. The person or people chosen should be someone you trust, such as close friends or family members. They should also be willing to accept the responsibility. You should ensure that those chosen are well aware of your wishes.

It is often wise to choose more than one person as a proxy in case your first choice is unable to act. If you choose more than one person, you should indicate in your directive whether they are to act jointly or consecutively. If acting jointly, the people named will make decisions together as a group. You should indicate in the directive whether decisions will be by consensus or by majority. If acting consecutively, the second proxy named will make medical decisions only if the first person named is unable to do so.

Changing Your Directive

You may change your health care directive at any time and do so as often as you wish. Your opinions about certain types of treatment may change over time, and should be reflected in your current health care directive.

Also, medical technology is constantly changing and improving, and these improvements may affect your decisions. If you have a specific illness or disease, you should stay up to date on the treatments available. Your doctor can assist you. In general, a health care directive should be reviewed at least every couple of years.

To change your health care directive, you need only prepare a new document. If you do, however, you should destroy any former directive to ensure your instructions are clear to those who are asked to follow them.

Safekeeping Your Directive

You should keep your health care directive in a safe place but where it is still accessible to family if they need to refer to it. However, do not keep a health care directive in a safety deposit box, since your family cannot obtain it quickly. Give a copy to your doctor to be kept in your medical records. It is also wise to give a copy to your proxy and tell that person how to obtain the original if necessary. You may also wish to have your directive reduced in size and laminated so you can carry it in your wallet.

Some hospitals have started to keep these documents on file. You may wish to ask your doctor about whether the hospital where he or she practises has such a policy.

HEALTH CARE DIRECTIVES

FREQUENTLY ASKED QUESTIONS

Is a health care directive the same as euthanasia or assisted suicide?

No. Euthanasia and assisted suicide involve taking positive steps to end someone's life. In an assisted suicide, such steps would usually be at the other person's request. Euthanasia is sometimes referred to as mercy killing. In Canada, both of these acts are illegal under the Criminal Code. In contrast, a health care directive is simply a written indication of your wishes for specific medical treatment and involves no positive action to end your life. The Manitoba Government has recognized the validity of health care directives in *The Health Care Directives Act.*

Why should I have a living will or health care directive?

By preparing a health care directive, you can relieve those closest to you of the burden and stress of trying to guess what your wishes might be at a very emotional time. Also, a directive can ensure that your personal wishes are respected.

How do I choose a proxy in a health care directive (living will)?

As this decision is very important, the person or people you select should be someone you trust, such as close friends or family members. You should make sure that each person chosen is willing to accept the responsibility. If more than one proxy is chosen, you should indicate whether they are to act jointly or consecutively in making decisions.

CHOOSING AND WORKING WITH A LAWYER

Your lawyer acts as your trusted representative in legal matters. As a member of the Law Society of Manitoba, a lawyer is bound by a standard of professional conduct that seeks to enforce reliability and integrity in the profession.

Finding a Lawyer

People find lawyers in different ways. You may find the following tips helpful:

Before you look for a lawyer, write a description of the work you want done. Give as much detail as possible.

Check with relatives, friends and neighbours for recommendations. Also consult local community agencies, such as the Law Phone-In and Lawyer Referral Program, the Age & Opportunity Centre and the Manitoba Society of Seniors. Remember: some lawyers are more experienced in some fields of law than others. These agencies can refer you to a lawyer familiar with the area of law concerning you. They can also give you a list of lawyers who practice in the field where you are seeking professional assistance.

You can also check the Lawyers listing in the Yellow Pages. Some of the lawyers indicate their areas of expertise and practice. Call a few lawyers listed to discuss your problem. (However, most lawyers prefer to discuss details in person rather than over the phone.)

CHOOSING AND WORKING WITH A LAWYER

Your Lawyer's Fees

During your first appointment, you should discuss:

- availability of legal aid;
- how and what you will be charged;
- when you will be billed;
- what disbursements (out-of-pocket expenses) you may be charged in addition to the fees.

It's also a good idea to ask your lawyer to put the answers to these questions in writing.

Keeping Your Legal Costs Down

You are paying for your lawyer's time. Therefore, the less of his/her time you use, the less it will cost. Here are some points on keeping costs down:

- Before you go to see your lawyer, get all your papers and documents together and put them in order.
- When you talk to your lawyer,
  - stick to the facts;
  - ask questions when you don't understand;
  - ask what you can do to reduce your costs.

- After you have talked to your lawyer,
  - don't make unnecessary phone calls;
  - consider writing to the lawyer instead of calling
  - your lawyer's secretary may be able to help you in routine matters.

Complaints and Discipline

The Law Society of Manitoba is the governing body for Manitoba lawyers. It licenses lawyers and has the power to look into and deal with complaints about lawyers.

The Society has a procedure for dealing with complaints of unprofessional or unethical conduct. You can get more information by calling the Society at 942-5571.

(Information for the above section provided by The Law Society of Manitoba)

GLOSSARY OF TERMS

Every area of the law has its own jargon. The following glossary defines some of the most common examples of legalese in several areas of the law.

Administrator/Administratrix

A person appointed to handle the estate of someone who has died without a will, or who has not named an executor in the will.

Beneficiary

A person named in a will to receive a benefit or advantage under the will.

Bequeath

To make a gift of personal property by means of a will.

Codicil

An addition to a will made by the maker, which is attached to and forms part of the will.

Common-law partners

Couples, either same sex or opposite sex, who either have registered their relationship under *The Vital Statistics Act* or who have lived together for three years or more. Under *The Intestate Succession Act, The Wills Act* and *The Dependants Relief Act* this also includes those couples who have lived together for a year or more and have a child together.

GLOSSARY OF TERMS

Devise

To make a gift of real estate by means of a will.

Dispose

The name for making a gift that includes both a bequest and a devise.

Estate

All of the real estate and personal property of a deceased person.

Execute

To sign a will in the presence of witnesses and in accordance with other legal formalities.

Executor/Executrix

The person (executor if male, executrix if female) entrusted in the will to administer the estate.

Fraud

Using deception to gain a material advantage for oneself.

Guardian

A person legally appointed to care for and provide the necessities to someone, such as a child, who is unable to take care of himself or herself.

GLOSSARY OF TERMS

Health Care Directive (Living Will)

A written document that states a person's preference as to the type and level of medical care he or she would or would not want to receive, and/or names a person (known as a proxy) to make medical decisions for the maker of the directive. The directive is legally binding if the maker is incompetent to make medical treatment decisions or unable to communicate his or her wishes.

Homestead Rights

The Homesteads Act creates two basic rights for a spouse or common-law partner who does not own the family home: 1) the spouse or common-law partner who owns the home may not sell it during the lifetime of the other spouse or common-law partner without consent and 2) the surviving spouse or common-law partner has the right to live in the home until he or she dies.

Intestate

To die without a valid will or a person who dies without a valid will.

Joint Tenancy

A form of ownership in property, in which there is a right of survivorship to the other person (or people) on the title.

GLOSSARY OF TERMS

Legacy

A gift of personal property by will. Personal property includes all types of property other than real estate.

Letters of Administration

A document granted by the court appointing someone to administer the estate of a person who has died without a will, or without having appointed an executor under a will. Generally, the closest relative who applies is entitled to the appointment.

Living Will

See health care directive.

Power of Attorney

A document authorizing a person or corporation to handle the financial and legal affairs of another person.

Probate

The procedure used to determine the validity of a will and the proper distribution of an estate. In probating a will, the court determines whether the maker had the capacity to make the will, whether the will was properly signed and witnessed, and that it was not made as a result of fraud or undue influence.

GLOSSARY OF TERMS

Public Trustee

An official appointed by the government to act for the public in administering trusts.

Surrogate Court

What used to be the court of probate in Manitoba. Now called the Court of Queen Bench's, Probate Division, it deals only with probate of wills and the administration of estates.

Suspicious Circumstances

Anything in a will that arouses the suspicion of the court.

Testament

Generally used to mean a will, but strictly it is a statement of a person's wishes concerning the disposition of his or her property after death.

Testate

Having left a valid will at one's death.

Testator/Testatrix

A person (testator if male, testatrix if female) who makes a will.

GLOSSARY OF TERMS

Trust

A right to property held by one person for the benefit of another.

Trustee

A person who holds legal title to property in trust for the benefit of another person or has been given power affecting the disposition of property for another person's benefit.

Undue Influence

Pressuring someone so as not to allow that person to exercise free judgment in making a decision.

Will

A person's written declaration of how his or her property is to be disposed of upon death. It may also contain other declarations of the maker's wishes.

USEFUL PHONE NUMBERS

Manitoba Seniors & Healthy Aging Secretariat 945-2127

Seniors Information Line 945-6565

(toll-free) 1-800-665-6565

Seniors Abuse Line 945-1884

(toll-free) 1-888-896-7183

Web site: www.gov.mb.ca/sd

Age & Opportunity Centre

(legal clinics are held at A&O Centres) 956-6440

Web site: www.ageopportunity.mb.ca

Canada Pension Plan (CPP)/
Old Age Security (OAS/GIS) ..... (toll-free) 1-800-277-9914

Web site: www.scd-dsc.gc.ca

Community Legal Education Association
(CLEA) 943-2382

Canada Customs Revenue Agency
(formerly Revenue Canada) ..... (toll-free) 1-800-959-8281

Web site: www.cra-arc.gc.ca

USEFUL PHONE NUMBERS

Law Phone-In and Lawyer
Referral Program 943-2305
(toll-free) 1-800-262-8800

Manitoba Society of Seniors 942-3147
(toll-free) 1-800-561-MSOS

Public Trustee 945-2700
(toll-free) 1-800-282-8069

Veterans Affairs Canada ..... (toll-free) 1-866-522-2122
Web site: www.vac-acc.gc.ca

NOTES

SURVEY

Please take a few moments to fill in the following survey and send or fax to:

Manitoba Seniors and Healthy Aging Secretariat
822 - 155 Carlton Street
Winnipeg MB R3C 3H8 Fax: 948-2514

1. I found the Legal Information Guide to be a valuable source of information

☐ Never ☐ Often ☐ Always

2. The Guide is easy to read and understand

☐ Never ☐ Often ☐ Always

3. I would improve the Legal Information Guide by:

4. I obtained a copy of the Guide from

☐ Seniors & Healthy Aging Secretariat ☐ Senior Centre ☐ Support Services

☐ Seniors Fair ☐ Health Centre

Other (please specify)

5. Age: ☐ 18-55 ☐ 55-65 ☐ 65-75

☐ 75-85 ☐ 85 and over

Thank You

NOTES

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